RIBU DAYA SDN. BHD.

v.

MALSA IDEAL SDN. BHD. & 2 ORS.

HIGH COURT SABAH & SARAWAK,
TAWAU
TUAN IAN H.C. CHIN J.
[SUIT NO.T 25 OF 1991]
2 JULY 1994

PRACTICE & PROCEDURE: O. 81 r. 2(1) RHC - Application for summary judgment - Triable issues - Preliminary objection by defendant - Whether application under O. 81 r. 2(1) was appropriate - Consideration of O. 14 RHC.

CONTRACT: Sale of two houses to plaintiff by 1st defendant - Purchase price for houses to be set-off by sale of sawn timber by plaintiff to 1st defendant - Failure to construct houses - Plaintiff claiming damages - Counterclaim by 1st defendant - Whether plaintiff failed to provide consideration in respect of sale and purchase agreement - Whether plaintiff failed to deliver the sawn timber - Liability of 2nd and 3rd defendants as guarantors - Whether plaintiff entitled to liquidated damages.

This was an application for summary judgment pursuant to O. 81 r. 2(1) of the Rules of the High Court 1980 (RHC) for specific performance and liquidated damages.

By two sale and purchase agreements dated 24 November 1987, the 1st defendant agreed to build and sell two houses to the plaintiff. By a further agreement of the same date, the plaintiff agreed to sell sawn timber to the 1st defendant; the price of which was set-off against the price of the said houses. The 2nd and 3rd defendants executed a joint and several letter of guarantee to indemnify the plaintiff against losses or damages sustained in the event of the 1st defendant's failure to complete construction. The houses were not constructed and the plaintiff demanded payment of interest as per the agreement. The 1st defendant by letter dated 18 December 1989 offered two other houses in substitution as settlement. The plaintiff rejected the offer and filed an action for specific performance and damages and sought to enforce the letter of guarantee. The 1st defendant filed a counterclaim. Subsequently, by way of affidavit, the plaintiff confined their claim to damages only.

The defendants contended that the plaintiff had failed to deliver the sawn timber and had not provided consideration in respect of the sale and purchase agreement. At the hearing, a preliminary objection was raised as to the appropriateness of filing this application under O. 81 r. 2(1) instead of O. 14 RHC when the claim was only for damages.

Held:

[1] The Court agreed with the submission and authority cited by Counsel for the plaintiff; namely the **White Book,** 1985, Vol.1 at p.1220, para. 86/1-7/1 , that the plaintiff could have proceeded under either O. 14 or O. 81.

[2] The three agreements, that is the two agreements for the purchase of the two houses and the agreement for the supply of sawn timber to pay for the houses had to be read together. The consideration for the two houses was the supply of sawn timber. There was no triable issue here.

[3] The plaintiff produced various debit notes issued against the 1st defendant for the supply of sawn timber and a letter from the 1st defendant requesting for the delivery of the same. The defendants never denied receiving the debit notes. The assertion of non-delivery of the sawn timber flew in the face of the offer by the 1st defendant of two other houses in settlement because if the 1st defendant had not received such sawn timber, it defied belief that the 1st defendant would offer two other houses to the plaintiff. The defendant's assertion was inherently inconsistent with the unchallenged documentary evidence. There was also no triable issue here.

[4] The defendant's Counsel's contention that the 2nd and 3rd defendant's were not liable as they were not privy to the agreeements made between the plaintiff and 1st defendant, the cause of action against them arising from the guarantee agreement, had absolutely no merit.

[5] The Court was of the opinion that the houses not having been built at all, the plaintiff could not claim for liquidated damages for delay in delivering the houses but only for damages for breach of contract. The measure of damages should be the market value of the two houses with individual titles, free from encumbrances as on 23 November 1989 which was the date of completion under the agreement.

[Judgment against the 1st defendant with damages to be assessed, costs at the Subordinate

Court's scale if less than RM100,000 and statutory interest. Judgment against the 2nd and 3rd defendants for RM66,000 with interest at 1.5% per month from 23 November 1989 until judgment and statutory interest and costs at Subordinate Court's scale. The 1st defendant's counterclaim struck off].

Cases referred to:

Marina Sports Ltd. v. Alliance Richfield Pte. Ltd. [1990] 3 MLJ 5 ***(refd)***

Banque De Paris Et Des Pays-Bas (Suisse) S.A. v. Costa De Naray & Anor. [1984] 1 Lloyd's Law Report 21 ***(foll)***

Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 ***(foll)***

Tractors Malaysia Bhd. v. Tio Chee Hing [1975] 2 MLJ 1 PC ***(foll)***

Raja Zainal Abidin Bin Raja Hj Tachik & 3 Ors. v. British-American Life & General Insurance Bhd. [1993] 2 AMR 36:2073 SC ***(foll)***

Loh Wai Lian v. S.E.A. Housing Corporation Sdn. Bhd. [1987] 2 MLJ 1 ***(foll)***

Eikobina (M) Sdn. Bhd. v. Mensa Mercantile (Far East) Pte. Ltd. [1994] 2 CLJ 6 SC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 81 r. 2(1)

Other sources referred to:

White Book, 1985, Vol. 1, p. 1220, para 86/1-7/1

For the plaintiff- C. Robertson; M/s. C. Robertson

For the defendants- Seibing Gunting; M/s. Donald Mojuntin & Seibing Gunting

JUDGMENT

Ian H.C. Chin J:

The plaintiff and the 1st defendant on 24 November 1987 executed two agreements for the sale and purchase of two units of double-storey terraced dwelling house with each costing RM32,000. At the same time, another agreement was entered into for the sale by the plaintiff to the 1st defendant of sawn timber of the value at least of RM66,000 and the purchase price for the sawn timber was to off-set the said purchase price of the two houses and, for that purpose, the agreement also provides for the increase of RM2,000 for each of the houses. Also on the same day, the 2nd and 3rd defendants executed, in favour of the plaintiff, the following guarantee:

> In consideration of you having purchased 2 units of double storey terrace house known as Lot 300 & 301, Taman Victoria aforesaid with the developer, Malsa Ideal Sdn Bhd. We, the undersigned the directors of the said Malsa Ideal Sdn Bhd hereby unconditionally and irrevocably agree to guarantee you as follows:
>
> 1. To be answerable and accountable to you at all times for the sum of RMR66,000 being the purchase price of the said properties which you had paid in full to the developer, Malsa Ideal Sdn Bhd in the event that the same has failed to construct and complete the said properties.
> 2. To indemnify or keep indemnified, all such losses, damages and expenses of whatsoever nature which you may sustain for the purpose of your enforcing this letter of guarantee in the event of non completion of the houses within the specified period.
> 3. This letter of guarantee shall be continuously enforceable against us which term shall include our executors, administrators and successors-in-titles.
> 4. Interest rate at 1.5% per month to be charged in case of non-issuance of certificate of fitness within 2 years from date hereof.

It was on 12 June 1989 that the plaintiff first wrote to the 1st defendant regarding the houses and in the following terms:

> Please kindly take note tht we have already approached your Mr. Wong Chong Sing on many occasions on the matter of the date of completion of the said houses.
>
> Mr. Wong has confirmed orally on numerous occasions that he would take up this matter seriously with you. Unfortunately, we have not heard anything concrete on such matter.
>
> Thus, we would like to remind you of the joint and several letters of guarantee dated the 24 November 1987 to which you have "kept us indemnified, all such losses, damages and expenses of whatsoever nature which you may sustain for the purpose of us enforcing this letter of guarantee in the event of non-completion of the houses within the specified period.
>
> Though we could not do anything now to recover for the losses as you are having another 5 months to recover it, we are still hoping that you could take our advice of following options:
>
> (a) to complete the said houses in time,
> (b) to exchange for completed lots at the time of expiry of the grace period to which we reserve the right to confirm the lots. You are required to inform us within 21 days of this letter which would be sent by courier service.
>
> You are reminded again that we will see by all means that the terms of the agreement should be honoured at all cost.

Hoping that you could look into this matter thoughtfully and seriously.

The plaintiff on 1 December 1989 again wrote to the 1st defendant and the relevant part of this letter reads:

Further to our letters ... dated 12 June 1989 .... 14 June 1989 and .... 18 June 1989, we regret to inform you that we have to seek indemnity against you from the losses or damage incurred by us. As per item 4 of the letter of guarantee, your Mr.Lau Kah Hing and Wong Chong Sing are required to pay "interest rate at 1.5% per month to be charged in case of non-issurance of certificate of fitness within 2 years from 14 November 1987.

The interst claims compounded are to be calculated as follows:

The plaintiff's letters of 14 and 18 June 1989, referred to in the just quoted letter, are not produced but no issue was taken as a result of the non-production. The 1st defendant in response to this letter of the plaintiff dated 1 December 1989 stated its position in a letter dated 18 December 1989, viz:

Ref: Joint & Several(sic) Letter of Guarantee
And Agreement Dated 24 November 1987
For Lot No. 300 And 301 of Taman Victoria.

We refer to our recent telecommunication and your letter dated 1 December 1989 in connection with the above captioned matter.

We have offerred *(sic)* two lots in Phase 1 which is now under construction and will be completed soon as settlement.

Moreover, your claim of interest calculated from date of agreement is unreasonable and is not accepted *(sic)* by this office. However, our board of directors will consider/discuss on this matter and we hope you will be a little bit patience in this matter.

Your kind assistance and co-operation in this matter will be highly appreciated!

Those are the undisputed facts relied on by the plaintiff for summary judgment under O. 81 r. 2(1) of the Rules of the High Court 1980 which application the plaintiff took out on 27 April 1994 and which arguments I heard on 21 June 1994. This is how the statement of claim is worded:

1. By 2 agreements in writing identical in all material respects and dated 24 November 1987, the plaintiff agreed to purchase and the 1st defendant agreed to build and sell in a proposed housing development called Taman Victoria, 2 units desribed as Lots 300 & 301 of double-storey terraced dwelling houses at a price of RM32,000 per unit payable in accordance with the schedule of payments appended to the agreement (sale and purchase agreement).

2.1 By a further agreement in writing and also dated 24 November 1987, the plaintiff agreed to sell and the 1st defendant agreed to buy 227 bundles of sawn timber at a price of RM66,000 to be utilised in the development of Taman Victoria (Sale of Timber Agreement).

2.2 By Clause C of the sale of timber agreement, the purchase price per unit of Lot 300 & 301 in the sale & purchase agreement was agreed by amendment to the price of RM33,000 per unit making a total purchase price of RM66,000.

3.1 Under the sale of timber agreement, the 1st defendant under Clause B took immediate possession and removed the 227 bundles of sawn timber to its site at Taman Victoria from the plaintiff's yard at Wing Yew Kilang Papan (1971) Sdn Bhd.

3.2 The purchase price of RM66,000 under the sale and purchase agreement for Lots 300 & 301 were paid on the signing of the Sale of Timber Agreement by being set off against the price of the 227 bundles sawn timber.

4.1 By a joint & several letter of guanantee in writing dated 24 November 1987 and in consideration of the plaintiff having purchased Lots 300 & 301 and having paid the purchase price of RM66,000 before the 1st defendant had completed the construction and delivery to the plaintiff of these 2 Lots, the 2nd & 3rd defendants agreed with the plaintiff to be answerable and accountable for the purchase price of RM66,000 paid and received in full to the 1st defendant in the event the 1st defendant failed to construct and complete the 2 Lots.

4.2 The 2nd & 3rd defendants by their joint and several letter of guarantee further agreed to indemnify and keep the plaintiff indemnified against all loses *(sic)* damages and expenses of whatever nature which the plaintiff may sustain by reason of the failure of the 1st defendant to complete Lots 300 & 301 within the time specified in the sale & purchase agreement.

4.3 The 2nd & 3rd defendants further acknowledged that the joint & several letter of guarantee would be a continuing guarantee and agreed further to pay interest on the

sum of RM66,000 at the rate of 1.5% per mensem in the event the 1st defendant was unable to obtain the certificate of fitness for Lots 300 & 301 within 2 years from 24 November 1987.

5. The sale & purchase agreement to which the plaintiff will refer as may be necessary for its full terms, meaning and effect, provided *inter alia* as follows:

> Clause 13. The 1st defendant undertook to complete Lots 300 & 301 within 36 months of working days from 24 November 1987 and that in the event of failure to complete within the time stated, the 1st defendant would pay to the plaintiff liquidated damages at the rate of 8% per annum of the purchase price.
>
> Clause 33. The 1st defendant undertook to transfer title to Lots 300 & 301 upon issue of the separate subsidiary title provided the plaintiff had paid the purchase price in full.

6. In breach the sale & purchase agreement, the 1st defendant failed to commence and construct any work in respect of Lots 300 & 301 since 24 November 1987 down to the date hereof in consequence whereof, the plaintiff has suffered loss and damage.

Particulars

Liquidated damages under Clause 13 at the rate of 8% p.a.on the sum of RM66,000 from the 24 November1990 down to the date hereof 1 February 1994 RM16,823.67

Interests at 1.5% per mensem under the joint & several letter of guarantee from 24 November 1989 down to the date hereof RM49,733.26

And the plaintiff claims against the 1st defendant

(a) Specific performance of the sale & purchase agreement and/or damages.
(b) Damages for breach of contract.
(c) Liquidated damages of RM16,823.67 with interests thereon calculated on the sum of RM66,000 from 1 February 1994 until payment.
(d) Costs.

And the plaintiff claims against the 2nd & 3rd defendants.

(a) RM66,000
(b) Damages for breach of the contract by the 1st defendant which the 2nd & 3rd defendants agree to indemnify.
(c) Interest of RM49,733.26 and continuing at the rate of 1.5% per mensem on RM66,000 from 1 February 1994 until payment.
(d) Costs.

It was in reply thereto that the three defendants on 22 March 1994 filed the following joint defence, *viz:*

1. The 1st defendant admits paragraph 1 of the amended statement of claim.
2. The 1st defendant denies the alleged existence of a sale of timber agreement as pleaded in paragraph 2.1 of the amended statement of claim and shall put the plaintiff to strict proof thereof.
3. As regard paragraphs 2.2, 3.1 and 3.2 of the Amended statement of claim the 1st defendant denies each and every allegation therein and repeats paragraph 2 hereof.
4. The 2nd and 3rd defendants deny having executed a joint and several letter of guarantee on 24 November 1987 or all as alleged in paragraph 4.1 of the amended statement of claim and shall put the plaintiff to strict proof thereof.
5. The 1st, 2nd and 3rd defendants deny each and every allegation pleaded in paragraphs 4.1, 4.2 and 4.3 in the amended statement of claim and contend that if ever the same guarantee agreement does exist, which is denied, its execution is privy to the 2nd and 3rd defendant only and does not bind or have any legal effect upon the 1st defendant by any terms and/or conditions as stipulated therein.
6. The 1st defendant admits paragraph 5 of the amended statement of claim and asserts that upon the plaintiff's failure in paying 10% if the purchase price or at all upon the date of execution of the sale and purchase agreement in accordance with the Schedule of payment thereof the plaintiff's breach thereof tantamounts to repudiation and which said repudiation was duly accepted by the 1st defendant.
7. As regard paragraph 6 of the amended statement of claim, the 1st defendant repeats paragraph 6 of this amended defence and say that in consequnce of the plaintiff's repudiation the 1st defendant is discharged from performing its obligation under the sale and purchase agreement and asserts that upon its refusal to contruct the two houses it constitutes a notice served to the plaintiff under clause 25 of the said agreement.
8. In the premises, the 1st 2nd and 3rd defendants deny that the plaintiff suffers any loss or claim at all.
9. Wherefore the 1st 2nd and 3rd defendants pray that this claim be struck out with cost.

10. Save as herein specifically admitted or not admitted, the defendant denies each and every allegation contained in the amended statement of claim as though the same were set out herein and specifically traversed seriatim.

Counterclaim

11. The 1st defendant repeats paragraphs 1,2,3,4,5.6. and 7 hereof.

12. By reason of the plaintiff's breach of the sale and purchase agreement dated 24 November 1987 as pleaded in paragraph 6 hereof the 1st defendant has suffered loss and damage.

In oppostion to the application for summary judgment, the 2nd defendant affirmed an affidavit on 7 June 1994, the relevent part of which reads:

1. I am the Managing Director of the 1st defendant and am duly authorised to make this affidavit on their behalf.
2. Except and unless stated otherwise, the matters deposed to herein are obtained from my personal knowledge and from books and/or documents of which I have access and control as the Managing Director of the 1st defendant.
3. I crave leave of this Honourable Court to refer to the Affidavit in Support of Ha Tung Hung sworn to on 26 April 1994 in support of the plaintiff's application under O. 81 r. 2(1) of the High Court Rules 1980 (hereinafter referred to as HA's Affidavit.")
4. As to paragraph 3 of HA's Affidavit, save that the existence of the sale and purchase agreements is admitted I aver that some of the terms and conditions of the said sale and purchase agreements have been either waived or superseded by subsequent dealings and conduct of the parties thereto.
5. Save that the 1st defendant admit the existence of the sale of timber agreement was made between the parties thereto at the request of the plaintiff solely to enable them to have the option to purchase in kind, in the form of sawn timber, the 2 units of dwelling houses referred to in the said sale and purchase agreement other than the specific mode of payment as stipulated in the said sale and purchase agreement. Furthermore, the said sale of timber agreement which was prepared by the plaintiff contradicted/contradicts certain terms of the sale and purchase agreement.

6. Save that I have made inspection of the said sawn timber at the plaintiff's premises the 1st defendant refused to take delivery on the grounds that their species and merchantable quality were pre-determined by the plaintiff and which sawn timber in the opinion of the 1st defendant, were semi-reject quality.

   There was disagreement between the plaintiff and the 1st defendant as to the basis for comparison as to the grade of sawn timber with that sold by Ladalam Timber Complex Sdn. Bhd. as stipulated in the sale of timber agreement.

7. Despite having agreed with the plaintiff to have the option to purchase in kind the said 2 units of dwelling houses the condition in the sale and purchase agreement that the payment of the 10% booking fee remained. The plaintiff failed to pay the same and therefore, was in breach of the agreement from the beginning.
8. I am verily advised by my Counsel that even if the sawn timber which were delivered to the 1st defendant (which is denied) they were delivered before the sale of timber agreement and the sale and purchase agreement and therefore,were past consideration to satisfy the said agreements.
9. As to paragraph 7.1, 7.2 and 7.3 of HA's Affidavit, the 2nd and 3rd defendants deny liability by reason of the averments under paragraphs 7 and 8 herein above mentioned.
10. As to paragraph 8 of Ha's Affidavit I aver that it is not wrongful for the 1st defendant to refuse delivery of the houses as the plaintiff was in breach and/or repudiated the agreement.
11. Paragraph 9.1 of HA's Affidavit is denied and I aver that the title deed mentioned in the sale and purchase agreement is C.L.105433878 and not C.L.105462495 as referred in HA's Affidavit.
12. As to paragraph 9.2 of HA's Affidavit save that the defendants received the letters the content of the same are/were denied. The statement of account is denied and further, the interest is excessive and unconscionable. Even if the plaintiff has a genuine claim against the defendants (which is denied) the plaintiff could not determine whether the delay in completion of dwelling houses is 2 years as stipulated in the sale of timber agreement or 3 years as provided under the sale and purchase agreement.
13. As to paragraph 10.1.of HA's Affidavit save that the 1st defendant admits the existence of the letter it was merely to give an option to the plaintiff to purchase the 2 lots. To the 1st defendant, they are of the opinion that the plaintiff are not entitled to have the lots referred to in the agreements. Due to the threatening nature, particularly under the second last paragraph of the plaintiff's letter, the 1st defendant informed one of its officer to draft a reply with the offer as stated therein.

14. The 1st defendant and/or the 2nd or 3rd defendant deny paragraph 10.2 of HA's Affidavit.
15. Paragraphs 11.1, 11.2 and 1.2 of HA's Affidavit are denied.
16. Alternatively, I verily believe that the plaintiff's application herein against the 2nd and 3rd defendants is premature and/or irrelevant.
17. Wherefore, I pray that plaintiff's application be dismissed with costs.

[Affirmed by Lau Ka Hin on 7 June 1994.]

At the hearing on 21 June 1994, Mr.Seibing Gunting, Counsel for the defendants, raised the preliminary objection that the application under O. 81 r. 2(1) is inappropriate because the plaintiffs are no longer claiming for specific performance. The plaintiff had in the affidavit filed on its behalf indicated that it no longer seek specific performance though it was claimed but only damages. Mr. Seibing Gunting argued that the plaintiff should have applied under O. 14. Mr. C. Robertson, Counsel for the plaintiff referred the Court to the **White Book,** 1985, Vol. 1 at p. 1220 para. 86/1-7/1 and submitted that the plaintiff could have proceeded under either O. 14 or O. 81 I agree with that submission and the authority cited do support that proposition of law. When asked to comment on the authority, Mr. Seibing Gunting conceded that the application can be made under O. 81

Before the arguments on the merits proceeded, I ask Mr. Seibing Gunting whether the defence that has been filed would be relied on or not for establishing triable issues. I sought clarification because the said affidavit filed herein in opposition to the plaintiff's application had made numerous admission, like the execution of the various agreements and guarantee, which the defence (supra) denied. Mr. Seibing Gunting replied that the affidavit filed herein by the 2nd defendant, and not the defence, would be relied on as showing triable issues. No objection was taken by Mr. C. Robertson and I proceeded, because the parties had agreed, on the basis that it is in order to look at the opposing affidavit though the opposing affidavit does not support the allegations of the defence to determine whether any triable issues have been raised. If only the defence is considered, I would have held that it was at the very least a sham.

The first of the arguments of Mr. Seibing Gunting is that "the plaintiff failed to provide consideration in repect of the sale and purchase agreement" for the purchase of the two houses. Of course, no money was actually paid but, as was mentioned earlier, the plaintiff and the 1st defendant had by another agreement provided for the payment of the purchase price for the two houses in kind, that is, by the supply of sawn timber. This has been clearly spelt out in the said agreement signed between the plaintiff and the 1st defendant on 24 November 1987. The three agreements, that is the two agreements for the purchase of the two housees and the agreement for the supply of sawn timber to pay the two houses, must be read together and not in isolation which Mr. Seibing Gunting wanted the Court to do. The consideration for the two houses is the supply of sawn timber. There is no triable issue here.

The basis for the next argument for a triable issue is the allegation in para.6 of the opposing affidavit (supra) and which Mr. Seibing Gunting in his written submission put this way: "the plaintiff failed to deliver the said sawn timber". The plaintiff had in the para.6 of the affidavit filed on its behalf alleged the delivery of the sawn timber in the following terms:

> 6. From 17 November 1987 to 24 November 1987, the 1st defendant made the necessary arrangements with respect to collection and transportation of the sawn timber at Wing Yew Kilang Papen (1971) Sdn Bhd where the plaintiff's timber had been stored. There is now produced and shown to me a bundle marked "HTH-3" true copies of the debit notes I caused to be prepared by the plaintiff and which were delivered by me pesonally & followed by a courier of the same documents to the 1st defendant. These debit notes were issued from the period 12 November 1987 to 25 November 1987 when I started tallying the timber to determine the volumes so that their respective values at the rate agreed would be reflected in the debit notes that were issued. On 19 November 1987, the 2nd defendant as director for the 1st defendant ordered additional timber to the value of RM30,669.74. There is now produced and shown to me in a bundle marked "HTH-4" the 1st defendant request for the additional timber and the plaintiff's invoices in a bundle which together come to the value of RM30,669.74 The total value of the invoices in HTH-4 & HTH-3 and the adjustments on discounts requested by the 1st defendant reflected through debit notes come to RM66,000 which was deemed to be in payment of the purchase price in the sale & purchase agreements.

The plaintiff produced various debit notes issued against the 1st defendant for the supply of sawn timber and a letter of the 1st defendant dated 19 November 1987 requesting for the delivery of sawn timber was also produced. Mr.Seibing Gunting, citing *Marina Sports Ltd v. Alliance Richfield Pte Ltd* [1990] 3 MLJ 5 where it is held that in application under O. 14 it is not for the Court to decide on the final merits of the issue, but only to provide an opportunity for the defendants to put up a defence if the Court is satisfied that there is an issue which should be tried, argued that it is a triable issue whether the timber had in fact been supplied or delivered. On the other hand, Mr. C. Robertson argued that "the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or *bona fide* defence and learned Counsel cited *Banque De Paris Et Des Pays-Bas (Suisse) S.A. v.Costa De Naray and Anor.* [1984] 1 Lloyd's Law Report 21 at p. 23 which says:

> It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, *ipso facto*, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or *bona fide* defence.

Mr. C. Robertson argued that the silence of the 1st defendant in the face of written demands for the houses and for penalty interest coupled with an offer by the 1st defendant of two other houses as replacement do not lend credibility to the allegation that the sawn timber were not supplied or delivered. This is more so, according to Mr. C. Robertson, when the non-delivery of the timber was raised by the 1st defendant for the first time in the defence. The first of my hurdles appears to be the amount of examination I should conduct of the affidavit filed by the parties. Though it is trite law that a conflict of evidence ought not to be disposed of on affidavit evidence only but the affidavit evidence must not be uncritically accepted and this in what the Privy Council in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 at p. 217 said:

> ... Although in the normal way it is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself if may be ....

Therefore, the affidavit evidence would have to be examined in detail to see if "there is a fair or reasonable probability of the defendants' having a real or *bonafide* defence." I am of the view that the whole of the evidence have to be looked at, even if it involves minute examination of documents and facts, if by such exercise the Court can come to a conclusion that there is no fair or reasonable probability of the defendants having a real or *bona fide* defence. The Privy Council in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 PC went through the evidence with a fine tooth comb, (that was what the Supreme Court was of the opinion in *Raja Zainal Abidin Bin Raja Hi Tachik & 3 Ors v British-American Life & General Insurance Bhd* [1993] 2 AMR (36:2073 SC), before dismissing a plaintiff's claim under O. 18 I do not see why the Court cannot do just that in an O. 14 proceeding. The Court also went through the evidence in *Banque De Paris Et Des Pays-Bas (Suisse) S.A. v Costa De Naray and Anor.Case* (supra) in considerable detail. In this case, the relevant allegation of the non-delivery of sawn timber is in one short para. (supra) of the affidavit filed on behalf of the defendants, which, for ease of reference, I again reproduce, viz:

> 6. Save that I have made inspection of the said sawn timber at the plaintiff's premises the 1st Defendant refused to take delivery on the grounds that their species and merchantable quality were pre-determined by the plaintiff and which sawn timber in the opinion of the 1st defendant, were semi-reject quality.
>
> There was disagreement between the plaintiff and the 1st defendant as to the basis for comparision as to the grade of sawn timber with that sold by Ladalam Timber complex Sdn. Bhd. as stipulated in the sale of timber agreement."

Para. 6 was all that was proferred by the defendants as establishing a fair or reasonable probability of the defendants having a real or *bona fide* defence, which is the defence that the sawn timber were never delivered. No details are given in the affidavit as to what quality of sawn

timber was supposed to have been supplied. At most the defendants' allegation is vague. It can be discerned that the price fixed for the sawn timber under the agreements is RM5 per cu.ft whereas the price for "other first grade sawn timber" is to be at the normal market price (see cl.a) As for what the normal market price was, this can be gathered from the letter written on behalf of the 1st defendant dated 19 November 1987 where the price is stated at RM10.50 for the "keruing" specie and RM11 for the "kapor" specie. Obviously, what was to be supplied by the plaintiff to the 1st defendant was anything but quality timber and this is provided for in the said cl.a of the agreement. The defendants did not elaborate why they should be complaining against the very thing which they have agreed. It is also to be noted that the agreement made mention of sawn timber already sold and to be supplied at the date of the agreement. The affidavit on behalf of the plaintiff specifically referred to timber supplied from 12 November 1987 to 25 November 1987 on which the 1st defendant was sent debit notes. The defendants never deny receiving the debit notes, which were courier delivered, relating to the supply of sawn timber by plaintiff to the 1st defendant. In the face of a demand by the plaintiff by letters for interest to be paid on account of the failure of the 1st defendant to build the houses, the 1st defendant by its said letter dated 18 December 1989 (supra) offered two other houses in substituion as settlement. The 2nd and 3rd defendants, who were at the relevant time directors of the 1st defendant, also acknowledge full payment of the purchase price for the two houses when they executed the said guarantee which perforce means that the sawn timber had already been delivered. Looking at the whole situation, if the plaintiff had failed to deliver the sawn timber after the execution of the three agreements on 24 November 1987, the 1st defendant would surely have protested. Similarly, if the plaintiff had not kept his side of the bargain and yet demanded the payment of interest by the 1st defendant payable under the agreement, such demand would surely had been made with howls of protest but there was not only no protest against such demand and instead the 1st defendant offered the plaintiff two other houses instead of those agreed under the agreement. All these, wihtout any doubt, point to the fact that the sawn timber was delivered. The assertion, that the timber were not supplied, in the affidavit filed on behalf of the defendants is implausible in the face of the said letter of the 1st defendant and in view of the said acknowledgement by the 2nd and 3rd defendants in the said guarantee. The assertion of non-delivery of the sawn timber fly in the face of the offer by the 1st defendant of two other houses in settlement because, if the 1st defendant had not received such sawn timber, it defies belief that the 1st defendant would offer two other houses to the plaintiff. The defendants cannot possibly succeed in their assertion that the sawn timber were not delivered, especially so in the face of the unchallenged document produced. The defendants' assertion is inherently inconsistent with the unchallenged documentary evidence. An attempt was made in the affidavit filed on behalf of the defendants to explain why the offer of two house was made by the 1st defendant and this is in para. 13(supra) which, I repeat, reads:

> 13. As to paragraph 10.1 of HA's Affidavit save that the 1st defendant admits the existence of the letter it was merely to give an option to the plaintiff to purchase the 2 lots. To the 1st defendant, they are of the opinion that the plaintiff are not entitled to have the lots referred to in the agreements. Due to the threatening nature, particularly under the seond last paragraph of the plaintiff's letter, the 1st defendant informed one of its office to draft a reply with the offer as stated therein.

The 2nd last para. of letter of the plaintiff referred to by the defendants reads: "You are reminded again that we will see by all means that the terms of the agreement should be honoured at all cost". The defendants contend that it was because of the threat contained in the said para. of the letter, the defendants offered the plaintiff the two houses even though the 1st defendant had not been delivered the timber. It was not explained what the defendants understand the alleged threat to be, such as whether the lives of the directors were threatened. I do not see how an insistence by the plaintiff that the 1st defendant performed its part of the bargain, which the said 2nd para. of the said letter is all about, can amount to such a threat that the 1st defendant felt constrained to offer two houses to the plaintiff for which the consideration was not paid. None of the defendants state to what fear they were put into by the said 2nd last para. of the said letter that forced the offer of the two houses. This allegation is as fanciful as it is incredible. That the defendants should in the first place file a defence denying

almost everything and then in the affidavit filed on its behalf, and contrary to the assertions of the defence filed, admit of them, and, as a result, forsake the defence, surely casts doubt on the credence to be attached to the proposed defence. There is also no triable issue here.

As for the 2nd and 3rd defendants, Mr. Seibing Gunting contended that they are not liable because they are not privy to the agreements made between the plaintiff and the 1st defendant. The cause of action arose out of the guarantee agreement not under the agreements between the plaintiff and the 1st defendant. There is absolutely no merit in this defence.

The next argument, though not mentioned in the address by Mr. Seibing Gunting to the Court was nevertheless asserted in the affidavit and which is that there was only past consideration for the two houses because the sawn timber were delivered before the date of the agreement. In the first place the agreement provides for the sawn timber already supplied or taken to be reckoned and in any event, the money due for the sawn timber already supplied can surely constitute valid consideration. There is also no merit in this proposed defence.

Though Mr. Seibing Gunting did not argue that the plaintiffs are not entitled to the damages claimed against the defendants, I, nevertheless, question Mr. C. Robertson as to the plaintiff's entitlement to both damages for breach of contract to deliver the two houses as well as liquidated damages for delay in building the two houses and I refer Mr. C. Robertson to *Loh Wai Lian v.S.E.A. Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 where the Privy Council considered the following clause of an agreement:

> Subject to clause 32 hereof and/or to any extension or extensions of time as may be allowed by the controller the said building shall be completed and ready for delivery of possession to the purchaser within eighteen (18) calendar months from the date of this agreement. Provided always that if the said building is not completed and ready for delivery of possession to the purchaser within the aforesaid period then the vendor shall pay to the purchaser agreed liquidated damages calculated from day to day at the rate of eight per centum (8%) per annum on the purchase price of the said property from such aforesaid date to the date of actual completion and delivery of possession of the said building to the purchaser.

and the Privy Council at p.4 held:

> A construction which would import into the clause a fresh obligation on the vendor to pay the calculated amount at the end of each day would be capricious, involving as it does a series of breaches of contract as each day passes, without payment being made. The whole tenor of the clause is, in their Lordships' view that the vendor is assuming as a matter of contract and subject to the occurrence of the condition precedent that the building remains uncompleted on the stipulated date, an express contractual obligation to pay a single sum which cannot become due, because it cannot be ascertained, until the building has been completed and possession can be delivered.

The relevant clause in our case reads:

> The developer undertakes to complete erection or construction of the said property within thirty six (36) months of working days from the date hereof. Provided that should there be any delay on completion within the stated period aforesaid the developer shall pay to the purchaser compensation by way of liquidated damages at the rate of eight per centum (8%) per annum of the purchase price only and not for any part thereof on the amount received by the developer. Provided that it shall be a condition precedent to the accrual of the right aforesaid to the purchaser that the several terms and obligations on the part of the purchaser to be observed or performed and shall have fully paid the purchase price to the developer in accordance with the schedule of payments.

Though the wordings are not similar, the effect of this clause is not dissimilar to that of the clause in *Loh Wai Lian* case. In fact the agreements of both cases are governed by the similar statutory provisions. I am of the opinion that what was said in *Loh Wai Lian's* case can also be said of our case. That being so, and the houses not having been built at all, the plaintiff cannot claim for liquidated damages. Mr. C. Robertson had more or less resigned himself to the position that the plaintiff could claim damages for breach of contract and not for the liquidated damages for the delay to deliver the houses because he could not say why *Loh Wai Lian's* case should not apply. The measure of damages should be the market value of the two houses with individual titles and free from encumbrances as on 23 November 1989 which is the date they were supposed to have been completed under the provisions of the agreement made between the plaintiff and the 1st defendant.and which the

1st defendant failed to do so. See *Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte. Ltd* [1994] 2 CLJ 6 SC.

Therefore as against the 1st defendant there will be judgment for the plaintiff for damages to be assessed and the damages shall be the market value of the two houses, with individual unencumbered titles, as on 23 November 1989 and which the Senior Assistant Registrar, upon motion by the plaintiff, shall assess after hearing evidence relating thereto. There will also be cost and statutory interest from the date the Senior Assistant Registrar shall have given judgment in respect of the said assessment of damages. The costs shall be at the scale of the Subordinate Courts if the amount of damages assessed shall be less than RM100,000.

As against the 2nd and 3rd defendants, there shall be judgment for the plaintiff for the sum of RM66,000 together with agreed interest at 1.5% per month from the 2 November 1989 until judgment and further stautory interest and costs at the scale of the Subordinate Courts.

In view of my ruling, the counterclaim of the 1st defendant is obviously unsustainable and I, in exercise of my inherent jurisdiction, order that the same be struck off.

WONG LEONG LANG

v.

TSENG CHOON CHIH @ TAY BAK HUI & 5 ORS.

HIGH COURT BORNEO, SIBU
TUAN HAJI MUHAMMAD KAMIL
BIN AWANG JC
[ORIGINATING SUMMONS 23/1993]
7 JANUARY 1994

LAND LAW: Section 178 Sarawak Land Code - Extension of caveats - Memoranda of acknowledgment and understanding executed - Developer to execute transfer of 2 sublots to plaintiff and plaintiff to pay developer upon delivery of titles - No transfer executed - Plaintiff lodging two caveats on land - No action filed - Caveats lapsing - Whether plaintiff had caveatable interest by virtue of the memoranda - Onus on plaintiff to prove - Sublots sold to third parties by developer - Allegation by plaintiff that sale and purchase a fraud to defeat his right - Whether any evidence of fraud - Plaintiff not pursuing claim for 7 years - Whether delay inordinate and inexcusable.

This was an application under s. 178 of the Sarawak Land Code for an extension of caveats in respect of two sublots.

The registered proprietors of the land entered into agreements for the development of the land with a developer. The land was divided into sublots and sublots Nos. 15 and 40 were alloted to the developer who built houses on the two sublots and sold them to two purchasers under a sale and purchase agreement. The developer had taken goods from the plaintiff and in consideration thereof he made two memoranda of acknowledgment and understanding on 4 November 1985 whereby the developer promised to execute a transfer of the two sublots to the plaintiff and the plaintiff promised to pay the developer RM20,000 upon delivery of the titles to the land. The titles were issued but no transfer nor payment was made. On 21 November 1985 the plaintiff lodged two caveats but no action was filed.

The issue before the Court was whether the plaintiff had acquired a claim to the title or a caveatable interest by virtue of the memoranda.

Held:

[1] The onus was on the plaintiff to prove that he had a caveatable interest. The caveator has to satisfy the Court that on the evidence his claim to an interest in the property raises a